



Legal analysis of corruption offences due to superior orders

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Abstract

Corruption within the bureaucracy is the highest compared to other sectors. Some cases show that the bureaucratic system is the cause of corruption in the bureaucratic environment, for example, a superior's order to cut the budget for procurement work and subordinates carry out the superior's orders as a form of job duties. interesting for the author to study is whether the superior's orders related to corruption result in subordinates also being considered as participating in the criminal act of corruption?, on these issues the author then analyses using normative research methods and the resulting research that against subordinates who do because they only carry out the orders of their superiors that they cannot refuse, then the criminal elimination of subordinates who carry out the orders of their superiors in corruption cases is regulated in article 51 paragraph (1). In overcoming corruption in the bureaucracy, it can be done by improving income (salary), improving bureaucratic management and improving ethics and morals by fostering pride and self-respect attributes of each position and job, role models and leaders or superiors are more effective in socialising views, assessments and policies, open to control, social control and social sanctions.

Keywords: Corruption, carrying out superior orders

Introduction

Corruption is an *extra ordinary crime* that damages all aspects of state life. Not only has corruption crippled the State's finances, it has also destroyed many existing pillars such as the cultural, social, political, moral and legal pillars of national security. According to Black's Law Dictionary, corruption is an act to provide unofficial benefits for oneself by taking the rights of others by using one's position to gain benefits contrary to one's obligations and the rights of others [1].

Widespread and systematic corruption will have a major impact on the development of a nation, so it must be eradicated with extraordinary efforts in order to create a just and prosperous society based on Pancasila and the 1945 Constitution. Satjipto Raharjo views that corruption in Indonesia has not only become a culture, but has also become an organised crime or criminal act with international dimensions, so that extraordinary efforts are needed to eradicate it [2].

The 2003 United Nations Convention Against Corruption (ACC 2003), describes the problem of corruption as a serious threat to the stability, security of national and international communities, has weakened institutions, democratic values and justice and endangers sustainable development and law enforcement. The 2003 United Nations Convention Against Corruption (hereinafter abbreviated as KAK 2003), which has been ratified by Law Number 7 of 2006, has implications for the characteristics and substance of the combination of two legal systems, namely "*Civil Law* and *Common Law*" [3]. so that it will affect the positive law governing criminal acts of corruption in Indonesia.

Various efforts have been made by the Indonesian government to tackle and eradicate corruption, such as updating laws and regulations related to corruption. Indonesia has had a legal regulation on the eradication of corruption since 1971, namely Law Number 3 of 1971

concerning the Eradication of the Crime of Corruption. However, because this regulation was deemed unable to keep up with developments and legal needs in the community, Law Number 31 of 1999 concerning the Eradication of the Crime of Corruption was issued, then revised again to Law Number 20 of 2001.

Corruption does not only occur due to self-initiative, but corruption can also occur due to the lack of courage of subordinates to refuse orders from superiors who have higher positions. Therefore, the perpetrators of the crime of corruption should not always be given punishment for what is not the desire of their own desires but the intervention of superior orders in a job. According to Andi Hamzah, the superior order is given on the basis of position, between the one who gives the order and the person who is ordered where the order is not only in a concrete sense but also a general instruction. An order of office (*ambtelijk bevel*) can also be interpreted as an order that has been given by a superior with the authority possessed to order sourced in *ambtelijke positie* or in other words a position according to the position of the one who gives the command task and of the person who receives the order [4].

The first factor of corruption on the orders of superiors is due to weak social values, personal interests become more important than public interests, the existence of individual ownership becomes the personality ethics underlying the social behaviour of most people. Second, there is no transparency and responsibility in the public integrity system. The public service bureaucracy is used by superiors of public officials to pursue personal political ambitions, only done solely for promotions and promotions. the quality and quantity of public services are not a priority but only seek popularity [5].

Corruption committed by subordinates in the bureaucracy due to superior orders is certainly a weakness of the supervision of the State Civil Apparatus Commission (KASN) because in the provisions of Article 30 of Law

Number 5 of 2014 concerning the State Civil Apparatus (ASN) explains that KASN functions to oversee the implementation of basic norms, code of ethics and code of conduct of ASN, as well as the implementation of the Merit System in ASN Policy and Management in a Government Agency. Then it is confirmed in Article 31 paragraph (2) letter a which states "KASN has the task of tracking data and information on the implementation of the Merit System in a policy and ASN Management in Government Agencies. KASN must of course be in line with the Personnel Supervisory Officer (PPK) in realising a clean bureaucracy without any intervention from superiors to subordinates. However, in practice there are still cases of criminal acts of corruption caused by superior intervention such as the bribery case for the ratification of the Jambi Regional Budget in 2018, where 3 (three) defendants in the 2018 Jambi Province Regional Budget (APBD) bribery case with the initials EM, A, and S admitted to giving bribes to DPRD members because they were forced and on orders and approval from superiors. Based on the background description of the problem, it is interesting to study in the form of legal research how to prove cases of criminal acts of corruption committed on the basis of superior intervention.

Research Method

In conducting research, accurate data is needed, both primary data and secondary data. In order to obtain the data required for this writing that meets the requirements, both quality and quantity, certain research methods are used. The research method in this writing is a normative juridical method, where normative juridical research is legal research carried out by researching library materials or secondary data [6]. Based on the background above, the problem formulation in this research focuses on analysis of corruption offences due to superior order

Results and Discussion

Corruption of superior orders is usually carried out for fear of refusing orders from higher superiors when ordered, but when at the time of proof it has been proven to commit corruption, sometimes subordinates are afraid to say the superior's orders because the superior has the power so that he puts up his own body to cover up the superior's crime. In the Criminal Code (hereinafter referred to as the Criminal Code) against subordinates when carrying out superior orders can be used as an excuse and can be released from the defendant. The reason as an elimination of punishment in superior orders (*ambtelijk bevel*) is regulated in Article 51 of the Criminal Code which reads:

1. A person who commits an act in execution of an official order given by a competent authority shall not be punished.
2. An official order without authority does not lead to the nullification of the punishment, unless the person ordered thinks in good faith that the order was given with authority and its execution falls within the scope of his/her employment.

Corruption committed by subordinates in the bureaucracy due to superior orders is certainly a weakness of the supervision of the State Civil Apparatus Commission (KASN) because in the provisions of Article 30 of Law Number 5 of 2014 concerning the State Civil Apparatus (ASN) explains that KASN functions to oversee the

implementation of basic norms, code of ethics and code of conduct of ASN, as well as the application of the Merit System in ASN Policy and Management in a Government Agency.

There are many rules governing the management of State finances in the bureaucracy, as stipulated in Article 35 paragraph (1) of Law No. 17 of 2003 which states that each treasurer is personally responsible for the loss of State finances in his management. In other words, every financial expenditure and income must be with the knowledge of the treasurer and the treasurer is responsible for it. Provisions and accountability in the use of State finances regarding the principal responsibilities of treasury officials for state financial documents are regulated in Government Regulation Number 45 of 2013 concerning Procedures for Implementing the State Budget. Article 173 stipulates that treasury officials are responsible for the administration of every government financial transaction carried out in accordance with the provisions of laws and regulations. Furthermore, the purpose and objectives of this administration are regulated in Article 174 paragraph (1) which states that the administration of government financial transactions as referred to in Article 173 is carried out to organise reporting and accountability for budget implementation.

Further arrangements regarding who is the responsible treasury official can be seen in the Minister of Finance Regulation Number 190/PMK.05/2012 concerning Payment Procedures in the Framework of Implementation of the State Budget. In the regulation, there are provisions regarding the responsibilities of each treasury official in the Work Unit (Satker):

1. The Budget User Authority (KPA) is responsible for overseeing the administration of documents and transactions related to the implementation of activities and budgets.
2. The Commitment Making Officer (PPK) carries out the authority of the KPA to take actions that result in the expenditure of the State Budget. Related to these actions, PPK has the task of storing and maintaining the integrity of all activity implementation documents.
3. In order to settle bills from third parties, the Paying Order Signing Officer (PPSPM) tests bills and payment orders from PPK. Therefore, PPSPM is responsible for storing and maintaining the integrity of all billing rights documents, which are supporting documents in the payment request letter (SPP) from PPK
4. The expenditure treasurer is responsible for receiving, storing, managing, and recording money/securities in his/her management, as well as managing documents related to transactions paid through supply money.

In practice, in a number of cases tried in the Corruption Court, defendants often argue that they are only carrying out orders in their positions, or carrying out orders from superiors. An example of a case of superior orders in committing an offence of corruption is the Corruption Crime of Misuse of Funds for Self-Management Activities at the West Jakarta Public Works Office for the 2013-2014 Fiscal Year. The case originated from self-management work activities at the West Jakarta Public Works Office for the 2013 fiscal year. There were four works worth approximately Rp 66, 649, 311, 310 in the form of maintenance of local channel infrastructure, maintenance of

road drainage channels, dredging and repair of connecting channels, and refunctionalisation of rivers / rivers and connectors. The implementation was allegedly not in accordance with the activity accountability report and financial report because there were forged documents in both reports that seemed to have been carried out by a third party (fictitious). The amount of state losses in this case, which amounted to Rp 43,000,000,000, was explained in the trial of the corruption case as follows

1. The Head of the Public Works Agency as the Budget User Authority ordered the implementation of the river normalisation project to cope with flooding, and ordered the Head of the Maintenance Section to make an SPT to the Sub-District Head, then ordered that each SPT budget be deducted 30% to be distributed to the treasurer, etc.
2. The SPT given to the Sub-district Head to carry out the normalisation was disbursed by treasurer at only 70% of the total cost stated in the SPT.
3. Then the Sub-District Head was directed not to make an accountability letter, because the SPJ was made by the Maintenance Head with fictitious receipts and matched with the RAB.
4. The subordinate sub-district head continued to carry out the river normalisation and the work was completed.

The above case shows that the bureaucratic system resulted in the Head of Section being involved in an act of corruption that was initiated by his superiors. In this case, the Corruption Court convicted the Kasudin and his Section Chiefs of committing the crime of Corruption together. However, if we relate it to the theory of carrying out superior orders so that it can be acquitted based on Article 51 paragraph (1) of the Criminal Code, this article is widely applied in several cases of acquittal of defendants on the grounds of carrying out orders from superiors or positions, among others:

1. Supreme Court Decision No. 194/PK/Pid.Sus/2010 on behalf of Syamsul Bahri, In Syamsul Bahri's case, the review panel saw that all of the defendant's actions were carried out on the orders of the legitimate Regent of Jeneponto. The Regent ordered the defendant to keep the account book for the project funds of the Program for Mitigating the Impact of Reduced Energy Subsidies in the Health Sector (PD PSE- BK), which later changed to the Compensation Program for Reduced Fuel Oil Subsidies in the Health Sector (PKPS BBM-BK). The use of the poor assistance budget to purchase an ambulance was also at the behest of the Jeneponto Regent. Even if the defendant is to be held responsible, it turns out that the defendant is not the person who has the authority to determine. The defendant was only the Chief Financial Officer of the Jeneponto Regency Government, not the manager of the PKPS BBM- BK project. "The use of the money in the account was all on the orders of the regent, therefore as a subordinate the defendant did not have the option to refuse."
2. In Supreme Court Decision No. 685K/PID/2005 of 2005 on behalf of the defendant Drs. H. ABDUL SHOBUR, SH.MM, the panel of judges found Shobur guilty of sending the letter. However, the sending of the letter was done in accordance with the orders of his superiors so that his actions did not fulfil the elements of the crime of corruption.

From the two decisions above, it is illustrated that the cause of corruption is due to bureaucratic management and systems that lead to corruption, but subordinates who carry out superior orders can be used as a reason for the acquittal of the defendant. Carrying out official orders is one of the reasons for removing criminal offences recognised in the Criminal Code. The reasons for criminal expungement in the Criminal Code include justification (*rechtvaardigingsgrond*) and excuse (*schulduitsluitingsgrond*). Carrying out official orders is part of the justification. Other reasons are emergency (*noodtoestand*), forced defence (*noodweer*), and carrying out statutory orders. Excuses for criminal offences are also recognised in legislation outside the Criminal Code. The formulation of "official orders" (*ambtelijk bevel*) is regulated in Article 51 of the Criminal Code, which reads as follows:

1. This article states that any person who commits an act to carry out an official order given by an authorised authority shall not be punished.
2. An official order without authority does not lead to nullification of the punishment unless the person ordered, in good faith, thinks that the order was given with authority and its execution falls within the scope of his/her employment.

The definition of "order" in Article 51 of the Criminal Code is based on Hoge Raad Decision 17 December 1899 No. 6603^[7], argues that an order here is not only an order in a concrete sense, but also an instruction of a general nature. An official order or *ambtelijk bevel* can be defined as an order that has been given by a superior, where the authority to give such an order comes from an *ambtelijke positie* or a position according to the office, both of the person giving the order and of the person receiving the order^[8].

According to Andi Hamzah, the order is given because of the position. Thus, there is a public law relationship between the person giving the order and the person being ordered. Orders given by public works officials to contractors based on the law of the agreement do not fall into the category of "official orders"^[9]. According to Sianturi, the legal relationship must be according to public law. The position of the order giver must be based on the provisions of public law. There are three conditions that must be fulfilled in order to be called an official order, namely:

1. There is a relationship between the order giver and the order taker based on public law;
2. the authority of the person giving the order must be appropriate to his or her position under that public law; and
3. the order given falls within the scope of his or her official authority.

Does the legal relationship have to be superior to subordinate (*ondergeschiktheid*) in an employment relationship, for example the dean giving orders to the assistant dean? Utrecht writes that neither the one who commands nor the one who is ordered need be a civil servant.

"*Ambtelijk*" simply means a relationship according to public law. It is also not necessary for the ordered to be hierarchically subordinate to the giver of the order. In this regard Prodjudikoro argues that an order is considered to be

an instruction from a superior to all subordinates without naming specific persons, to do things which without the instruction would constitute a criminal offence. However, a police officer's order to a private worker to clear a road that obstructs traffic falls within the scope of an order protected by Article 51 paragraph (1) of the Criminal Code even though the police and the private worker are not superior-subordinate^[10].

The means and instruments used to execute the order must be appropriate. For example, a cigarette seller should not receive an order from the police to detain a suspect. A mismatch between the order and the job can cause a person to not be able to take refuge behind Article 51 paragraph (1) of the Criminal Code. For example, Supreme Court Decision No. 166 K/Kr/1963 states that an order from a court president to a court clerk on a matter outside the scope of the clerk's work is not an order as referred to in Article 51 paragraph (1) of the Criminal Code^[11].

Regarding the means and manner in which the order is conveyed, Jan Rummelink argues that the order need not be directly received by the recipient. The usual means of communication, including other auxiliary means, can also be used to convey the order. This context relates to the concept of delegation of authority. According to this concept, A, based on the mandate he receives from B as the authorised official, may issue orders to others on behalf of B^[12].

The authority of the ruler is another factor that must be considered. This means that the person giving the order must be authorised. Therefore, paragraph (2) of Article 51 of the Criminal Code states that an official order given without authority does not eliminate the punishment. Thus, the recipient and executor of the order must know that the order they receive is given by an authorised official, and that the order falls within the scope of authority of the official in question. The notion that the executor of the order "must know" in this context, said S.R. Sianturi, has a broad meaning, namely according to reasonable calculations or according to general calculations he should know^[13].

Thus, there are two conditions that must be fulfilled in order for an order executor to escape criminal charges, namely^[14]

1. subjective requirement, the maker must in good faith perceive that the order came from the authority, as seen in the case of Supreme Court Decision No. 194/PK/Pid.Sus/2010 on behalf of Syamsul Bahri, the defendant's actions were carried out on the orders of the legitimate Regent of Jeneponto who had the authority to keep the account book of the project funds of the Program for Mitigating the Impact of Reduced Energy Subsidies for Health (PD PSE-BK) which later changed to the Compensation Program for Reduced Fuel Oil Subsidies for Health (PKPS BBM-BK); and
2. Objectively, the execution of the order must be within the scope of the author as a subordinate. So in Supreme Court Decision No. 194/PK/Pid.Sus/2010 on behalf of Syamsul Bahri, the defendant was not a person with decisive authority. The defendant was only the Head of Finance of the Jeneponto Regency Government, not the manager of the PKPS BBM-BK project. "The use of the money in the account was all on the orders of the regent. For Andi Hamzah, Article 51 paragraph (1) is an excuse because the unlawful element does not exist, while Article 51 paragraph (1) is an excuse because the act remains unlawful, but the perpetrator is not guilty

because he is acting in good faith to carry out the orders of an authorised official when in fact he is not.

Conclusion

Corruption of superior orders is usually carried out for fear of refusing orders from higher superiors when ordered, but when at the time of proof it has been proven to commit corruption, sometimes subordinates are afraid to say the superior's orders because the superior has the power so that he puts up his own body to cover up the superior's crime. In the Criminal Code against subordinates when carrying out superior orders can be used as an excuse and can be released from the defendant. Excuses as an expungement of punishment in superior orders an official order without authority does not lead to the expungement of punishment, unless the ordered person thinks in good faith that the order is given with authority and its implementation is included in the scope of his work.

Corruption committed by subordinates in the bureaucracy due to superior orders is certainly a weakness of the supervision of the State Civil Apparatus Commission because in the provisions of Article 30 of Law Number 5 of 2014 concerning the State Civil Apparatus, KASN functions to oversee the implementation of basic norms, code of ethics and code of conduct of ASN, as well as the application of the Merit System in ASN Policy and Management in a Government Agency.

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